Considering a Negotiator's View of the Court Process

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The traditional role model of the zealous advocate requires an effective lawyer to prepare every case for trial. If a reasonable settlement offer emerges before the trial concludes, the lawyer may advise his client to accept it. If such an offer does not come, the lawyer continues to litigate. The lawyer wastes little time and effort on negotiation because the ultimate goal is court judgment. The courtroom provides the true test for legal advocacy skills. The problem with this model is that empirical data on lawyer activity does not support it. Trials or court judgments on the merits occur in fewer than three out of ten cases filed in court.[1]

Common experience suggests that what drives lawyers toward settlement is their evaluation of probable success in court. The stronger the case appears, the less interest the lawyer has in settling. Why compromise when a client can win all at trial? A lawyer focuses on negotiating an acceptable solution only if the court case appears weak. Why risk losing everything at trial if something can be saved through negotiation?

In theory, a plaintiff should agree to a settlement if the net benefit of accepting a specific offer equals or outweighs the estimated benefit to be gained by staying with the court process. A defendant should settle if the estimated burden of continuing to the end of litigation outweighs the cost of accepting a specific demand now. Lawyers for both sides should use their predictions of the likely court outcome as the principal means of deciding whether to recommend settlement to their respective clients.

The value of this court-centered perspective depends upon two assumptions: first, that lawyers can determine objectively the probable court outcome in most legal disputes, and second, that most lawyers make this determination with a reasonable degree of accuracy. Both assumptions, however, are questionable. Lawyers recognize the uncertainties and subjectivity inherent in predicting the court outcome in

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1. "During 1985, civil cases closed without court action represented 48 percent of all terminations Only 5 percent of all cases terminated (excluding land condemnation) reached trial. The number of cases reaching trial has been steadily decreasing since 1982." Annual Rept. of the Dir. of the Admin. Ofc. of the U.S. Courts, 1985, at 157. H. ROSS, SETTLED OUT OF COURT 3-5 (2d ed. 1980). "The principal institution of the law in action is not trial; it is settlement out of court." *Id.* at 3.

most disputes. They value experience and personal judgment as the basis for evaluation, often eschewing rigorous analysis. Moreover, few lawyers test their experience for consistency and accuracy in prediction.

How should lawyers view the relationship between negotiation and litigation? Are there inherent tensions between the two processes? Do psychological factors help explain these tensions and suggest ways to improve lawyer performance? Can lawyers use the court alternative to complement negotiation?

This Article approaches these questions from both the psychological and legal perspectives. The first section discusses three categories of psychological factors that affect the way lawyers negotiate: self-deception, personality attributes, and social psychological variables. The second section focuses on three ways lawyers can use the perceived court outcome during the negotiation process: building a good lawyer-client relationship, defining an effective bottom line, and maximizing bargaining power for the client. A final section describes some insights suggested by the earlier analysis.[2]

I. PSYCHOLOGY, NEGOTIATION, AND THE COURT

"Who has deceived thee so oft as thyself."
- Poor Richard's Almanac
January 1738

The psychology of personal interaction is important to the practice of law. An effective lawyer-client relationship is basic to the lawyer's

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2. I refer throughout this Article to the court as the "alternative to negotiating a settlement in a legal dispute." Exclusive reference to the court is a useful simplification. First, legal education has taught lawyers for decades that the court process is the primary means to negotiate settlements. My reference, therefore, corresponds to the assumption of most lawyers in practice today. Second, most lawyers concentrate on client problems for which the court is the prominent forum for resolution, problems in such areas as personal injury, probate, divorce, criminal, civil rights, and commercial law. This Article speaks directly to these situations. Third, the principles developed by the court-alternative analysis can be easily adapted to cases with significant non-court alternatives and are therefore relevant and useful regardless of the alternative available. Finally, I recognize that not only are there other alternatives available in most cases, but that in many legal disputes the court is not a viable alternative at all.

I am also using the court alternative as a BATNA — Best Alternative To a Negotiated Agreement. R. FISHER & W URY, GETTING TO YES 104 (1981). *See also infra* text accompanying note 60. *But see* Kritzer, *The Lawyer As Negotiator: Working in the Shadows*, 19 WORKING PAPER #4, SERIES 7, DISPUTE PROCESSING RESEARCH PROGRAM (January 1986), in which the author suggests that "complement" is a more appropriate term than "alternative" to refer to the relationship between negotiation and litigation. *Id.* at 19.

success. Many cases proceed to court not because the lawyer prefers it but because the lawyer has been unable to persuade the client to accept what the lawyer thinks is a reasonable settlement.[3]

The level of a lawyer's success may also depend on healthy interaction with the opposing lawyer. In many ways the art of negotiating[4]—and litigating[5]—is the art of interpersonal communication. Psychological factors limit this communication and ultimately shape its internal structure.

This section analyzes the psychological forces at work as lawyers evaluate and use a probable court outcome within the negotiation setting. The three categories discussed are the characteristics of self-deception, the role of personality attributes, and the impact of social psychological variables.

A. *Self-Deception*

One of the most persistent and devastating problems in legal practice is the power of self-deception. In general, people have a natural inclination to notice those things that support their own perspective, opinion, or attitude.[6] This universal bias is reinforced for lawyers by the advocacy role that dominates American legal ethics. The legal advocate must be a zealous guardian of the client's best interest, a role model that serves to increase the lawyer's commitment to the client's perspective. Self-deception can be a natural result of this professional commitment, and its impact is especially unfortunate for the negotiating lawyer's view of the court alternative.

A lawyer's self-deception begins as early in a case as an initial investigation of fact or law. The lawyer may pursue a search more vigorously if he or she expects the information gained will support the client's claim. The zealous advocate role model requires the discovery of everything possible to help the client succeed. Recent studies suggest that people will determine the direction and extent of their search for information based on their need to maintain a positive self image.[7]

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3. *See* G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 59 (1982). In a study among negotiating attorneys in Phoenix, Professor Williams found that "attorney-client misunderstandings were the single largest factor in determining what cases went to trial rather than settling." In cases that went to trial "over 50% of the attorneys said it was due to the unwillingness of one or the other of the clients to accept a settlement figure recommended by their own attorney." *Id.*

4. *See* G. NIERENBERG, FUNDAMENTALS OF NEGOTIATING 4 (1973).

5. *See* Rothblatt, *Psychological Techniques of Persuasion in the Trial Process*, 11 OHIO N.U.L. REV. 755 (1984).

6. D. GOLEMAN, VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION 197-202 (1985).

7. Pysczynski, Greenberg, & LaPrelle, *Social Comparison after Success and Failure: Biased Search for Information Consistent with a Self-Serving Conclusion*, 21 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 195 (1985).

Fulfilling this role model brings the lawyer strong professional satisfaction, adding to his or her self-esteem.

A lawyer may also restrict inquiry on a case in order to preserve a sense of internal compatibility with the professional role model.[8] The lawyer for client A is not responsible for developing the facts or law that support the claim of opposing party B. However, ignoring information that supports the other side distorts any evaluation of the merits of the case. (Vigorous searching for evidence to support the client's case suggests less enthusiastic demands for information supporting the opposing party's claim.)

The lawyer may not restrict the investigation consciously, but the impact of self-deception is often felt through the unconscious mind. Psychologists suggest that the human brain imposes an automatic, intelligent filter between the unconscious and the aware mind, so that in the recognizing, sorting, and selecting process done by the unconscious, most information is filtered out.[9] The standard by which the unconscious selects information to send to the aware mind appears to be the relevancy of a particular thought to current mental processes.[10] Ideas that do not support current inquiry or personal self-esteem tend to remain hidden.

As a result, lawyers on both sides will tend to overestimate the probable court outcome in favor of their respective clients.[11] This self-serving exaggeration elevates each party's bottom line and increases the chances for competitive negotiation behavior, stalemate, and an eventual trial. The effective lawyer's task is to override these natural barriers to objective inquiry and evaluation and to educate the client and opposing counsel to a more objective probable court outcome.

Self-deception does have its positive role, although even here it is not without danger. The mind often represses the recognition of fear, anxiety, and other painful thoughts, screening them from awareness so that a person can continue to think and act as if little risk or danger were present.[12] Negative pressure usually inhibits human achievement. An ironworker or window-washer is trained not to think about the risk of falling from the high perch. A lawyer responds more effectively in the courtroom, the law library, or at the negotiating table if the lawyer is neither fearful of losing the high stakes involved nor anxious about personal embarrassment.

Moderate self-deception of this kind can build confidence and promote steady performance of high quality The context, however, is crucial.

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8. *Id.*

9. *D.* GOLEMAN, *supra* note 6, at 61-83.

10. *Id.* at 64-65.

11. H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 75 (1982); Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 Am. BEHAVIORAL SCIENTIST 220-22 (Nov. Dec. 1983).

12. D. GOLEMAN, *supra* note 6, at 241-43, 245.

Selective ignorance of risks or unfavorable facts can be disastrous if they materially affect the ultimate outcome. A lawyer who enters a case with a sense of superior competence vis-a-vis the other side[13] may be in for a lesson in humility Moreover, confidence sometimes reduces the motivation for discovering the other side's assets and liabilities, an important element of good lawyering. The dangers of self-deception appear to outweigh its benefits for the negotiating lawyer.

B. *Personality Attributes*

Personality traits play a role in every negotiation. The more important traits for our purposes are self-esteem, the drive to achieve, personal leadership qualities, risk-taking propensity, the need to control, aggressiveness, ethical flexibility, the level of mistrust of others, tolerance for ambiguity, disorder and confrontation, and the need for close rapport and support from colleagues.[14] Each lawyer has a unique combination of these traits which, when mixed with that of the opposing lawyer, establishes a psychological environment that influences the negotiation outcome.

Thus, every negotiation is different. An agreement by one pair of negotiators may vary substantially from that of another pair.[15] Although many separate factors can contribute to this wide variance, the balance of personalities is usually a significant contributor. Moreover, the fewer the negotiators and the more informal the interaction, the greater the likely effect of individual personalities on the resulting outcome.

To negotiate well, a lawyer must understand his own psychological strengths and weaknesses first, and then those of the opposing side. For example, the lawyer may be a habitual gambler with a client's interests in negotiation, but reluctant to jump into a courtroom on the same case. This combination of risk-prone and risk-averse behavior, not uncommon among lawyer-negotiators, may distort the case results unfavorably for the client.

A useful way for a lawyer to proceed with a psychological self-assessment is to consider how he negotiates with himself in making professional decisions. For example, the lawyer should ask himself the following questions: Does he or she call or write opposing counsel to

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13. Bazerman, *supra* note 11, at 225; Lax & Sebenius, *The Power of Alternatives or the Limits to Negotiation*, 1 NEGOTIATION J. 163, 170 (1985).

14. *See* Gilkey & Greenhalgh, *The Role of Personality in Successful Negotiating*, 2 NEGOTIATION J. 245, 245-46 (1986).

15. A simulated negotiation experiment conducted by Professor Williams among experienced trial lawyers in Des Moines, Iowa, graphically demonstrated that conclusion. Out of eleven sets of lawyers negotiating the same personal injury accident case, no two results were the same, and the settlements ranged from $15,000 to $95,000. G. WILLIAMS, *supra* note 3, at 6-7.

communicate? Does this decision on the mode of communication vary with the context of each case, or is it a consistent pattern systematically applied? Do specific personality traits make one method more successful than another?

The process by which a lawyer decides these questions to a large extent depends on personality factors such as risk preference, need to control, aggressiveness, ethical flexibility, and the need for collegial rapport. Lawyers, like all humans, develop complex assumptions which mask or distort realities that are either not understood or too painful to admit consciously [16] This propensity to distort reality, a form of self-deception, is based in part on certain personality and background factors, such as self-esteem, a generalized level of mistrust, leadership qualities, ethical flexibility, intelligence, and parental and educational influence. A lack of sensitivity, knowledge, or interest in the subject matter of the negotiation may also play a role.

People attribute motives to human behavior in one of two ways. An act is the result of either the actor's stable personality traits or situational factors beyond his or her control.[17] When faced with actions of a disliked opponent that are harmful to a client, the lawyer will tend to attribute these acts to stable, negative personality characteristics of that opponent and ignore or downplay the situational factors that might have molded the conduct. However, if the lawyer's client or friend behaves poorly, the lawyer will usually attribute those acts to situational factors compelling such negative conduct, and the effect of personality is overlooked. Lawyers should be sensitive to the interrelationship of personality and situational factors.[18]

A change in one personality variable within a negotiation may cause significant variations in outcome. For example, within a competitive negotiation an increase in the risk-averseness of one side operates to the disadvantage of that side over time,[19] but may not be to the advantage

16. *See* D. GOLEMAN, *supra* note 6, at 61-83.

17. *See* Shaw, *Political Terrorists: Dangers of Diagnosis and an Alternative to the Psychopathology Model*, 8 INT'L J. OF LAW AND PSYCHIATRY 359, 361 (1986). For negotiating tactics to affect this attribution of motive, *see* D. PRUITT, NEGOTIATION BEHAVIOR 146-47 (1981).

18. I am reminded of two jogging friends, one who runs indoors on a small enclosed track and the other who prefers outside streets and sidewalks. The inside runner chooses the comfort of a known and stable environment, rigidly structured, providing a supportive and cozy atmosphere in which to exercise. The other chooses an open environment, subject to the vagaries of the weather, with few structural restrictions. Despite these obvious differences, their personality constructs are quite similar. The outdoor jogger establishes a strict regimen much like his indoor friend, running a fixed pattern of streets and only in good weather. Personal attitudes and traits may create similarities in different situations, or distinctions in those that are alike.

19. Neilsen, *Risk Sensitivity in Bargaining with More than Two Participants*, 32 J. ECON. THEORY 371 (1984).

of all opponents in a greater than two-party negotiation.[20]

Moreover, the impact of personality types on each other will influence the outcome. Competing lawyers with equally high levels of confidence, patience, self-esteem, and risk-prone attitudes, coupled with comparable ability, will often create an environment more conducive to negotiation success. However, the clash of competing personality types — an aggressive competitor against a trusting cooperative — will increase the probability of either an unfair result or a stalemate.[21]

C. *Social Psychological Variables*

Social psychological variables, such as role, gender, culture, and structure, have an important impact on the way lawyers use the probable court outcome in the negotiating context. Expectations that surround these variables shape a lawyer's negotiating ability and influence the possibilities for success.

Role. A lawyer's role is defined by the legal profession as combining the functions of a zealous advocate[22] and a thoughtful adviser[23] within the framework of our adversary system of justice.[24] The adversary system creates a set of expectations that define a professional negotiation. These subjective expectations influence the outcome of negotiations because, by being continually reinforced through lawyer behavior, they become stable and self-sustaining within the negotiation setting.[25] A lawyer's reputation, built as it is on previous experiences, is a powerful tool in shaping common expectations.[26] Because of a universal human craving for approval, most lawyers will try to conform to these expectations in order to justify an attractive professional reputation.[27]

Lawyers frequently link role expectations with "saving or losing face" in a negotiation.[28] The more experience lawyers have and the more developed their reputations as negotiators have become, the more sensitive they are to perceived loss of image.[29] Experienced lawyers do not

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20. Roth, *A Note on Risk Aversion in a Perfect Equilibrium Model of Bargaining*, 53 ECONOMETRICS 207 (1985).

21. *See* D. PRUITT, *supra* note 17, at 81-87.

22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-4 (1981).

23. *Id.* at EC 7-5.

24. *Id.* at EC 7-1, 7-19.

25. *See* Roth and Schoumaker, *Expectations and Reputations in Bargaining: An Experimental Study*, 73 AM. ECON. REV. 362, 371 (June 1983).

26. *Id.* at 371.

27. *See* Assor and O'Quin, *The Intangibles of Bargaining: Power and Competence versus Deference and Approval*, 116 J. SOCIAL PSYCHOLOGY 119 (1982); Rubin, *Negotiation: An Introduction to Some Issues and Themes*, 27 AM. BEHAVIORAL SCIENTIST 135, 138-39 (Nov. - Dec. 1983).

28. Rubin, *Negotiation*, 27 AM. BEHAVIORAL SCIENTIST 135, 138 (Nov. - Dec. 1983).

29. *Cf.* Hilltrop & Rubin, *Position Loss and Image Loss in Bargaining*, 25 J. CONFLICT RESOLUTION 521, 530 (1981).

want to look weak or foolish before negotiating colleagues or clients. This concern for appearing inadequate often causes a lawyer to become rigid,[30] to refuse to reevaluate the probable court outcome after discovering new information, or to fail to consider settlement options that are objectively in the interests of the client.

These considerations are especially applicable when negotiating lawyers are from different status levels.[31] High status lawyers will be more willing to negotiate and compromise with low status opponents if the opponents affirm the lawyers' effectiveness by positive feedback and validation of their negotiating positions.[32] A low status opponent who rejects the lawyer's demand can mitigate the damage this rejection causes by recognizing the lawyer's ability Any rejection of position will normally be interpreted by a high status lawyer as an attack on the lawyer's personal competence.[33]

Lawyers are representatives of their clients. The level of accountability may vary within the representative role, and this variability becomes an important factor in a negotiation. If a client demands a high degree of accountability, the lawyer will tend to be more competitive in face-to-face negotiations with the other side.[34] Threats, positional commitments, arguing to get the other side to concede, efforts to dominate, and other pressure tactics are common if the client is demanding daily briefings.[35] In contrast, the more trust and confidence that exists between a client and lawyer, the less strict the accountability and the more flexible the lawyer will be during the negotiation. The lawyer may show that flexibility by a more problem-solving approach to the dispute.

Gender Stereotypes of male and female negotiators may be exaggerated and untrue, but many lawyers continue to accept them as descriptions of reality The stereotypic man is competitive and distributional in negotiating style, apparently due to youthful experiences in athletics. The stereotypic woman is concerned for others, open about her emotions, and sensitive to human relationships, apparently due again to early socialization.[36]

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30. *See* D. PRUITT, *supra* note 17, at 29.

31. Lawyers involved in the same dispute may represent very different status levels. Some examples: one may be from a large prestigious law firm, and the other, a sole practitioner. One may be chief counsel in a large corporation or government agency; the other, a new associate in a public interest law firm. One may defend murderers and rapists; the other, shoplifters, and traffic speeders.

32. *See* Tjosvold & Huston, *Social Face and Resistance to Compromise in Bargaining*, 104 J. SOCIAL PSYCHOLOGY 57 (1978).

33. *Id.* at 66.

34. *See* Carnevale, Pruitt & Seilheimer, *Looking and Competing: Accountability and Visual Access in Intergrative Bargaining*, 40 J. PERSONALITY AND SOCIAL PSYCHOLOGY 111, 118 (1981).

These stereotypes may seem inaccurate as applied on an individual basis, but they persist. One reason may be the joint effects of role expectations and self-deception.[37] If lawyers believe that the stereotypes exist, they will consciously notice information that supports the stereotype and repress other data that refute it. Furthermore, a lawyer's responses to interpersonal contact will tend to confirm the perceived expectations of the other lawyer. For example, a female lawyer's response to a male opponent will likely confirm behavioral stereotypes the male has, because the female will try to match the expectations that the male expresses through his words and behavior.[38]

In empirical tests men and women behave similarly in most negotiation settings. Nevertheless, women negotiators have been found to be less comfortable generally with a competitive bargaining role.[39] They speak less, show more self-doubt, make fewer threats and derogatory comments, use fewer positional commitments, are less willing to form coalitions in greater than two-party negotiations, and exhibit more persuadable and conforming behavior.[40] In other words, women use less standard competitive tactics compared with men, perhaps because of a greater concern for maintaining harmonious interpersonal relationships. On the other hand, women consider themselves equally as competitive as men.[41] Women's images of their own behavior conform to the traditional competitive role model. In the final analysis, the respective behavioral patterns may be described in terms of bell-shaped curves, where the curve for men is skewed slightly towards competitiveness and for women, toward problem-solving. The areas of overlap, however, are substantial.

Combining the pressure of "saving face" with gender differences produces an interesting result. Stalemates are more likely in mixed gender negotiations where the female lawyer is representing a male-dominated client (such as corporate management) and the male lawyer is representing a female-dominated client (such as a union of female workers).[42] Expectation pressures on each lawyer flow from both the client and the other negotiator. In the mixed-gender case, both lawyers

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35. *Id.* at 118-19.

36. J. NIERENBERG & I. ROSS, WOMEN AND THE ART OF NEGOTIATING, 102, 153-56 (1985); Skrypnek & Snyder, *On the Self-Perpetuating Nature of Stereotypes About Women and Men*, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 277 (1982).

37. *See supra* notes 6-13 and accompanying text.

38. *Cf.* Skrypnek and Snyder, *supra* note 36, at 278. *See also supra* notes 24-26 and accompanying text.

39. Kimmel, Pruitt, Magenau, Konar-Goldband & Carnevale, *Effects of Trust, Aspiration, and Gender on Negotiating Tactics*, 38 J. PERSONALITY AND SOCIAL PSYCHOLOGY 9, 21-22 (1980).

40. *Id.* at 21-22.

41. *Id.* at 22.

42. *See* Wall, *The Intergroup Bargaining of Mixed-Sex Groups*, 62 J. APPLIED PSYCHOLOGY 208 (April 1977).

tend to exhibit competitive behavior in order not to lose "face" before either their clients or the opposing lawyer.[43]

Culture. People create subjective symbols or constructs with which to interpret the complex reality of their world. These constructs are what give each group an identity They provide members with a sense of belonging. Each group's constructs are its culture.

Lawyers experience many cross-cultural contacts within an active law practice. The most obvious is in the field of international trade and diplomacy Negotiators from different nations may handle the same negotiation problem in varying ways based on separate community experiences and expectations.[44] For example, organizational decision-making will be a slow consensus-building process for the Japanese; for the Mexicans, a sensitive yet centralized process dependent on certain key personalities who have leverage; for the French, a process that emphasizes long-range objectives and principles over short-term gain; and for Americans, an open, often impatient process, dependent on the authority of certain positions, with short-term results as the chief aim.[45]

A second cross-cultural contact for lawyers is among different national subgroups within the American legal community At any one time, lawyers with ancestral ties to Ireland, Italy, Eastern Europe, China, and Mexico may be negotiating with each other. The degree to which a lawyer will reflect the role expectation of an ancestral home may depend on how long the lawyer has been an American, how much the local community reflects "the old country," and whether the client has the same ethnic role expectations.

A third example is the constructs of a general practitioner from a small, rural community compared with those of a corporate lawyer from a large, urban center. The more personal, informal, and open qualities of the small town, with its high value on non-material benefits, can clash dramatically with the fast-paced, individualistic, materialistic life of the large city Informal problem-solving in an atmosphere of mutual trust may not mix well with high pressure competition where nothing is left to trust.

A final example of cross-cultural contact lies in variations among different professional disciplines,[46] variations that can also be described in terms of different role expectations. A banker, lawyer, realtor, professor, accountant, and physician, though all Americans, may view the

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43. *Id.* at 212.

44. *See* G. FISHER, INTERNATIONAL NEGOTIATION: A CROSS-CULTURAL PERPSECTIVE (1980).

45. *Id.* at 28-34.

46. Unterman, *Negotiation and Cross-Cultural Communications*, in INTERNATIONAL NEGOTIATION: ART AND SCIENCE 69, 74 (Center for the Study of Foreign Affairs 1984).

same problem from different perspectives. Their separate professional language and education reflect these cultural differences. A lawyer most often confronts this cross-cultural element in direct or cross-examination during deposition and trial, but its importance can also be great during negotiation.

A lawyer's primary objective is to be sensitive to the differing values, beliefs, needs, and viewpoints that may be culturally based. "Successful intercultural negotiators are aware that people indeed think, feel, and behave differently and are at the same time, equally logical and rational."[47]

Structure. Institutional pressures frequently influence a negotiation outcome. The judicial system itself can be viewed as a structure with its own set of expectations defined by the people and procedures operating within. Lawyers will often govern their negotiation by certain time and agenda schedules that the local court system has established.[48]

Other organizations can also influence negotiating behavior. Corporations, governmental agencies, and other client or employer organizations develop their own accepted methods and limits for negotiation.[49] For example, several federal agencies have established procedures for the participation of regulated industries in negotiating new rules governing their conduct.[50]

The lawyer's place within an organization can be important. A negotiator who is in a more central position with regard to information is more influential than one on the periphery. Studies suggest that others view the well-placed negotiator as being more competent and having greater power.[51]

Psychological variables influence lawyer behavior in negotiation and litigation. Understanding these influences helps a lawyer develop some workable insights for integrating the court alternative with the client's goals. Before defining those insights, however, the function of the probable court outcome in negotiation should be examined.

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47. P CASSE & S. DEOL, MANAGING INTERCULTURAL NEGOTIATIONS at xvi (1985).

48. *See supra* notes 23-35 for a discussion of the impact of similar institutional expectations under the role concept.

49. *See generally*, NEGOTIATING IN ORGANIZATIONS (M. Bazerman & R. Lewicke ed. 1983).

50. *See* Agencies' Use of Alternative Means of Dispute Resolution, 1 C.F.R. §§ 305.85-5, .86-3 (1986); Harter, Points on a Continuum: Dispute Resolution Procedures and the Administrative Process, Report for Admin. Conf. of the U.S. (June 5, 1986). For an example of application at the state level, *see* Vessels, *Negotiated Rulemaking—A New York State Success Story*, 3 NEGOTIATION J. 53 (1987).

51. Stolte, *Power Structure and Personal Competence*, 106 J. SOCIAL PSYCHOLOGY 83, 87, 90 (1978).

II. USING THE PROBABLE COURT OUTCOME DURING NEGOTIATION

"If a situation requires undivided attention, it will occur simultaneously with a compelling distraction."

-Hutchison's Law
Murphy's Law, Book Two

A lawyer has many uses for an accurate assessment of the probable court outcome. First, the lawyer can use the process of evaluating the court outcome to build a realistic and satisfying lawyer-client relationship. Second, the probable court outcome can function as an effective bottom line for evaluating any settlement offers made. Finally, the lawyer can use a positive probable outcome as a power source within the negotiating context. Concentration on the court alternative, however, has a significant danger — it can consume the lawyer's time and commitment to the extent that nothing remains for a successful negotiation. The three positive uses of the probable court outcome are discussed as a means of reducing the danger the court alternative presents.

A. *Building the Lawyer-Client Relationship*

Interpersonal relationships are central to practicing law effectively Law schools and the legal profession have only recently emphasized the study of, and training in, interpersonal communication. A number of reasons may explain past neglect: the historical timing and rigidity of substantive legal curriculum, the widespread belief that knowledge of such skills is intuitive, and the lack of objective standards for evaluating lawyer experiences in this area. Recent innovation in legal education is changing this situation,[52] but results of these efforts are as yet incomplete.

A most important contact for the lawyer is the client. On a personal level, the lawyer-client relationship affects the degree of satisfaction the lawyer receives from performing the legal role. On a professional level, it can affect not only the process of resolving the client's problem, but also the outcome the lawyer is able to achieve. To develop a good relationship with the client should be a major goal for every lawyer.

A lawyer can improve the professional relationship with the client by sharing the process of evaluating the probable outcome of the court alternative. Joint effort toward a common goal generates a sense of

52. *See* Brown, *Simulation Teaching: A Twenty-Second Semester Report*, 34 J. LEGAL EDUC. 638 (1984); Macdonald, *Curricular Development in the 1980s: A Perspective*, 32 J. LEGAL EDUC. 569, 584-85 (1982); Sacks, *Legal Education and the Changing Role of Lawyers in Dispute Resolution*, 34 J. LEGAL EDUC. 237, 241 (1984); Van Valkenburg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584, 586 (1984).

common purpose that builds a feeling of closeness. It also gives the client a view of the lawyer's ability to handle the legal issues in the case, breeding client confidence in the lawyer's competence and encouraging greater trust in the relationship. A compatible relationship will help later when the lawyer may need to persuade the client either to accept a responsible settlement offer or to recognize a less-than-ideal court judgment as a realistic result.

The better the lawyer-client relationship, the more flexible the client is likely to be during negotiation or litigation. An important variable within the relationship is the degree to which the client will require a lawyer to be accountable during the process. The more trust that develops, the more the client will allow a lawyer to use the lawyer's own judgment on the issues that arise during the course of a case. Freedom from frequent, detailed accountings to the client may give a lawyer the benefit of flexibility during negotiation and boost the lawyer's own professional satisfaction.

The negotiating lawyer should be equally concerned that the opposing lawyer have a healthy relationship with his or her client. If the other side enjoys a lawyer-client relationship that breeds internal trust and flexibility, the negotiation may avoid a competitive intransigence that can often lead to stalemate and ultimately court.

Working with a lawyer on probable court outcomes also educates the client on the uncertainties and risks inherent in the court alternative. By sharing this process, a lawyer prepares the client for the task of evaluating any settlement offers against a realistic standard. Unreasonable client expectation can destroy gains made by effective negotiating.

Finally, the value of the perceived court outcome depends on the accuracy of the facts upon which the analysis is based. The quality of a lawyer's work product is based on the amount and quality of information the client provides. The better the lawyer-client relationship, the greater the information exchanged and the more likely it is to be accurate.[53]

Determining the probable court outcome in most cases is a difficult task if done properly. Despite the skill required and the importance of the result, little formal training is provided to lawyers to prepare them for the job. However, practitioners and academics have recently developed useful checklists, computer programs, and decision-tree analysis that assist in this effort.[54] In addition, some firms specializing in eco-

53. Pruitt & Lewis, *The Psychology of Integrative Bargaining*, in NEGOTIATIONS 161, 175-76 (D. Druckman, ed. 1977).

54. *See* G. WILLIAMS, *supra* note 3, at 110-29; Nagel, *Microcomputers, Risk Analysis and Litigation Strategy*, 19 AKRON L. REV. 35 (1985). Professor Nagel defines his terms in an initial paragraph:

> Litigation strategy mainly refers to deciding whether to go to trial or settle out of court. Risk analysis mainly refers to procedures for making meaningful decisions when one alternative provides a reasonably certain benefit or cost

nomic, engineering, and medical analysis offer lawyers evaluation services for most personal injury actions.[55]

Uncertainty is inherent in evaluating the probable court outcome. Probable jury awards may vary depending on the demographic breakdown of the jurors chosen, the urban or rural nature of the jurisdiction, the predisposition of the judge, the type of injury or claim, the ability to use demonstrable evidence at trial, and other factors.[56] To compound the problem, many states have recently legislated new liability rules that will affect court awards during the next few years.[57] This environment makes predicting court outcomes a speculative task at best.

Besides court and jury decisions, litigation costs are frequently difficult to predict. The present value of an expected money judgment to be received next year is an easy computation, but the method of quantifying the cost to the client of time delay in reaching a solution is considerably more difficult. How can a lawyer translate into financial terms the client's emotional and psychological stress caused by an adversary discovery period and trial? How does he or she predict the amount of time prior to trial, whether a party will appeal the judgment, or how much the final legal fee will be?

The risk of choosing the court alternative over a negotiated settlement is another variable that is difficult to value in monetary terms. This risk is primarily the client's, not the lawyer's, and depends to a large degree on the client's personal payoff schedule. Professional ethics require the lawyer to pass to the client the decision whether to accept or reject a settlement offer.[58] To put it differently, the client, not the lawyer, is supposed to decide whether to accept or reject the risk of going to court.[59] Whether the client is more risk-prone or more risk-averse will therefore affect the probability of choosing the court alternative.[60]

(like accepting a settlement), and another alternative provides a benefit or cost that is contingent on the occurrence of a probabilistic event (like going to trial). *Id.*

55. For recent examples, see the regular advertisements and classified ads at A.B.A. J. 74, 97, 121 (August 1986).

56. *See* M. SHANLEY & M. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980 (Institute for Civil Justice 1983), in which the authors point to many common characteristics of the two urban county juries over time, as well as their differences.

57. *See* Houser & Perlman, *At Issue: Should Pain and Suffering Awards Have Statutory Limits*, 72 A.B.A. J. 34 (May 1986).

58. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7, 7-8 (1981); MODEL CODE OF PROFESSIONAL CONDUCT, Rule 1.2 (1983).

59. Many lawyers, however, try to infer client approval to go to court from the fact that the client has hired the lawyers to help solve his or her problem.

60. The client's risk-taking attitude is not fixed. It can fluctuate depending on how the issues are framed, the nature of the subject matter, or over time. *See* Bazerman, *supra* note 12, at 211. The lawyer's interaction with the client in assessing the court alternative may have a significant impact on the client's risk-preference level. *See* H. RAIFFA, *supra* note 11, at 73-77.

B. *Defining the Bottom Line*

A lawyer can use a probable court outcome as a bottom line or reservation price during the negotiation.[61] If a settlement proposal does not offer net benefits equal to or in excess of the estimated value of the probable court outcome, a plaintiff's lawyer should advise the client to choose the court alternative. Similar reasoning applies to the defendant, for whom the standard settlement provides lower costs rather than greater benefits.

The more definite the lawyer can be in estimating the probable court result, the more useful this prediction will be as a "bottom line" during the negotiation process. Arriving at a firm figure, or a definitive range of figures, may seem to be an elusive goal. Besides the inherent uncertainties and risks already mentioned, any initial assessment will probably change over time as the lawyer receives increased information, the substantive law changes, or the client loses other opportunities. A negotiating lawyer must respect this dynamic characteristic and change the bottom line standard when appropriate. Rigorous preparation can provide a clear and persuasive range of figures for the initial bottom line, and regular mid-course corrections should keep the standard current.

Differences between respective valuations of the probable court outcome often cause opposing lawyers and their clients to choose the court over settlement.[62] Inadequate information encourages competitive and threatening behavior within the negotiation setting,[63] and competitive behavior leads to more negotiating stalemates and greater resort to the courts.[64] Nothing can guarantee success at negotiation, but to the extent lawyers can demonstrate the accuracy of their evaluation of the probable court outcome, they will maximize the chances for favorable results.

Any realistic probable outcome range defines the zone of agreement for a case,[65] and a responsible settlement should occur within this zone. A legal negotiation should be a communication process aimed at discovering and agreeing on the most reliable prediction of a court outcome in the case, and then identifying settlement options that can improve this outcome in the interests of both clients.

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61. Professors Fisher and Ury refer to this concept as the BATNA. R. FISHER & W URY, *supra* note 2, at 104.

62. H. ROSS, *supra* note 1, at 163.

63. *See* D. HARNETT & L. CUMMINGS, BARGAINING BEHAVIOR: AN INTERNATIONAL STUDY 164-65 (1980). *See also* Pruitt & Syna, *Mismatching the Opponent's Offers in Negotiation*, 21 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 103 (1985), for a discussion of the effect of deadlines and ignorance of the other side's payoff schedule on the prevalence of mismatching (high demand in response to low demand).

64. G. WILLIAMS, *supra* note 3, at 51.

65. For a detailed explanation of the zone of agreement, *see* H. RAIFFA, *supra* note 11, at 45-50.

C. *Maximizing Bargaining Power*

The probable court outcome provides a limit on the range of acceptable solutions through negotiation.[66] For each party the negotiated agreement should be at least equal to or more beneficial than its prediction of the result at court. The better the probable court outcome is for one party, the higher the bottom line and the more favorable the resulting agreement must be before it will be accepted. To the degree that a desirable court outcome is communicated accurately to and accepted by the other side, the opposing lawyer will perceive a restricted zone of agreement,[67] increasing the pressure for settlement within this reduced zone. This impact is an important element of bargaining power.

The probable court outcome is not a static value; it increases or decreases over time depending on information and events. A lawyer can improve the estimate by acting in a way consistent and supportive of the court alternative. This close tie between the court alternative and bargaining power explains the emphasis that many lawyers place on litigation. They try to maximize the bargaining power of their clients by concentrating on court action and using the probable court outcome as an explicit threat within the negotiation context.[68] Such behavior focuses attention on the court schedule and encourages counter threats, leading to a competitive atmosphere and greater likelihood of stalemate.[69] Trust —a good relationship — is diminished to the extent that lawyers feel threatened by the other side.[70]

The danger of equating the threat of a positive court alternative with power is that a lawyer will overlook the other elements that constitute bargaining power.[71] Using the court alternative as a prominent threat reduces what power the lawyer could have generated from a compatible relationship, beneficial options, legitimate norms, long-term contacts, and a warm, personable nature. In order to maximize power, a lawyer should use each element of power consistent with the other elements, appropriate to the context of the case, and compatible with the lawyer's own personal characteristics.

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66. D. PRUITT, *supra* note 17, at 25, 87-88.

67. A zone of agreement exists in a negotiation if the bottom line of the plaintiff (in a personal injury suit) is lower than the reservation price of the defendant.

68. For a thorough analysis of threats and their impact within the negotiation setting, *see* T. MILBURN & K. WATMAN, ON THE NATURE OF THREAT: A SOCIAL PSYCHOLOGICAL ANALYSIS (1981).

69. *See* D. PRUITT, *supra* note 17, at 77-78; G. WILLIAMS, *supra* note 3, at 48-51.

70. G. WILLIAMS, *supra* note 3, at 49-50.

71. There are five other elements of bargaining power in addition to a good alternative: skill and knowledge of the negotiator, good relationships among interested parties, good options, legitimacy, and commitment. Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAVIORAL SCIENTIST 149 (Nov. - Dec. 1983); *see also* C. KARASS, THE NEGOTIATING GAME 156-63 (1974).

A lawyer can increase existing bargaining power in a specific negotiation by improving the outcome reasonably expected from the court, the probability that the outcome will occur, the other side's perception of either of these figures, or any combination of these three. Some lawyers suggest that the essence of negotiation is to mislead the opponent as to your bottom line while not being misled yourself.[72] The risk in that strategy is that the lawyer will focus exclusively on perceptions rather than on improving either the probable court outcome itself or its likelihood. The success of a perceptions strategy depends on the ineffectiveness of the opposing lawyer, while actual improvement in probable court outcome lies largely within the lawyer's own ability

The court alternative as a power source has five dimensions. The first is based on the relationship between the probable court outcome and the perceived zone of agreement. If court is the best alternative to a negotiated agreement for both sides, the range of probable court outcomes will be the zone of agreement. The balance of bargaining power will favor the side that has evaluated the court alternative more accurately and communicated it more credibly. The existence of positive non-court alternatives reduces the power of the probable court outcome.

Second, the impact of the probable court outcome depends in part on the perception the other side has of the acceptability to the lawyer and client of choosing the court over a negotiated settlement. Bargaining power is given away by one lawyer to the degree that the lawyer perceives the court alternative as an acceptable or even preferable choice for the other side. This dimension recognizes the risk-averse attitudes of both clients and lawyers. This effect explains in part the traditional importance given by lawyers to the act of "puffing" the probable result at trial and continually threatening to "see you in court."

Third, the more easily a client can pursue the court alternative, the more potent its impact on the other side's negotiation tactics. If litigation is more expensive and time-consuming, the probable court outcome is less effective as an element of power, no matter how favorable it is.

Fourth, the better the probable court outcome, the less interest a lawyer and client may have in the work of negotiating a settlement. If settlement is to be achieved, the other side may need to do more of the work to bring it about. Moreover, to be personally respected by opposing counsel is a powerful motivating force that may encourage a lawyer in this situation to make added efforts to find agreement.[73]

Finally, the balance of psychological factors such as confidence level, willingness to take risks, and role expectations has an important impact

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72. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-28.

73. *See* Rubin, *supra* note 28, at 138, 140-42.

on the negotiation outcome. The relationship is normally inverse: as one lawyer's confidence level or risk-prone attitude rises, the other's declines. In sports, the act of trying to influence adversely the opponent's psychological equilibrium is referred to as "psyching out" the competition. In legal practice, it is considered zealous advocacy

III. INSIGHTS

> "If the only tool you have is a hammer, you tend to see every problem as a nail."
>
> *-Abraham Maslow*

The court alternative dominates legal thinking. The court is the one process in which lawyers hold a monopoly Law schools train their students well in its use, and the legal profession supports its preeminence. Lawyers therefore commit themselves and their clients early and often to court procedures as the principal means of resolving disputes. Recent studies, however, suggest that this commitment is at variance with lawyer experience. At least seven out of ten court cases are resolved by non-adjudicative means.[74]

An important question for the legal profession is how to conform a lawyer's method of using the court alternative with the lawyer's experience in resolving disputes. The answer may lie in more attention to the probable court outcome and its proper uses in negotiation and less focus on court procedures and schedules as the principal dispute-resolving process.

Traditional strategy calls for the lawyer to use the probable court outcome as a threat to force the opposing side to concede. For maximum credibility, this threat must be accompanied by a willingness if not eagerness to go to trial, a confidence (if not egotistic self-assurance) in courtroom ability, and a manipulation of court procedures to pressure the opposition. To the lawyer using this traditional strategy, the court remains the principal dispute-resolving process.

Traditional negotiating strategy overlooks the psychological forces at work within the legal negotiation. A lawyer who makes the credible threat to go to court assumes that (1) he or she has defined the probable court outcome as objectively as possible, (2) opposing counsel has evaluated the probable court outcome in the same way and with a similar result, or the lawyer is willing to revise his or her result based on what the opposing lawyer says, and (3) the other side would prefer

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74. Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 89 (1983).

to settle than risk the anxiety, costs, and uncertainties of trial.

The earlier psychological discussion, however, destroys these assumptions.[75] Lawyers are likely to bias their separate evaluations of probable court outcome in favor of their respective clients. The two estimates exaggerate the gap that exists, making voluntary settlement less attractive. In addition, the threat of going to court is a "controlled threat" to most lawyers, more of an inducement to an attractive test of competence than a threat of impending punishment.[76] The present system promotes settlement in the majority of cases largely because the formalized court procedures require substantial time delays that discourage full litigation. Traditional negotiation strategy is inefficient and ineffective as judged by an understanding of the active psychological forces.

To be effective, the lawyer must convey to opposing counsel the existence of a good probable court outcome, a willingness to take the case to trial if necessary, and a realistic confidence in his or her courtroom ability. The same elements are present, but the environment and effect created are different. The lawyer has signaled an interest in settlement as a realistic goal, and the result should be an efficient resolution of the dispute, whether ending in settlement or trial.

Self-deception, personality attributes, and social categories such as role, gender, culture, and structure influence the way lawyers use the probable court outcome during negotiation. Three insights may help lawyers develop a more effective negotiating pattern.

Awareness. Self-deception cripples a lawyer who wants to be an effective negotiator. To reduce the negative impact of self-deception, a lawyer and client should play the roles of the opposing side in the dispute as they prepare the case for negotiation.[77] The effects of this role-play can improve realism and objectivity and "unfreeze" ideas that may open common ground for a favorable settlement.[78]

Lawyers can experiment with other innovative ways to confront their self-deceptions. They could pose a particularly difficult client problem as a case study to an evaluation panel of lawyers in the law firm.[79] If the case is large enough to justify the expense, the lawyers could select a neutral fact-finder who would review all relevant documents, listen to

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75. *See supra* text accompanying notes 3-51.

76. T. MILBURN & K. WATMAN, *supra* note 68, at 114.

77. D. GOLEMAN, *supra* note 6, at 237. Early references can be found in Greek and Indian literature to the need for awareness or insight as a prescription for delusion. *Id.*

78. Bazerman, *supra* note 11, at 212-15.

79. Cal. B. Ass'n CLE tape, Negotiating Settlements in Personal Injury Cases, comments of James Bostwick. Mr. Bostwick recommends that the lawyer at times reverse positions in presenting the case study, so that the partners will not know who represents which side and therefore will not be tempted to advocate the position of the firm's client.

presentations by both sides, and provide an advisory opinion.[80] The mini-trial[81] and the summary jury trial[82] are other methods for dissolving the self-deception that distorts evaluation of the probable court outcome. Awareness is best if built into the structure by which the lawyer prepares for negotiation and trial.

Competing strategies. The balance of negotiation theories, strategies, tactics, and styles[83] influences negotiation outcome. The two principal theories recognized by researchers and practitioners are problem-solving and competitive.[84] If opposing lawyers use competing theories or strategies, each lawyer may define or use the probable court outcome differently A competitive lawyer will usually distort the probable outcome more in favor of his or her client and will use it more as a threat than a persuasive tool.

Competition between negotiating theories usually results in one lawyer feeling less comfortable with the strategy or style eventually chosen, like an athletic team playing at the opponent's home field. Good analysis and use of the probable court outcome requires a significant level of objectivity and sensitivity to the other side's information and perspective. Being less comfortable in a negotiation creates more anxiety, increases a lawyer's concentration on process over substance, and encourages defensive tactics. The pressure to be continually on guard damages a lawyer's use of the probable court outcome as both a bottom line and an element of bargaining power.

When lawyers share the same strategy or style, whether problem-solving or competitive, their attention can be focused on substance to a much greater degree, increasing the chances for effective evaluation and use of the probable court outcome.

Education. Psychologists have many things to teach lawyers. This article describes some concepts and recent studies that are relevant to legal negotiation. Much more can and should be discovered, discussed, and learned. Fully integrating psychological concepts in regular substantive courses, or a separate course entitled Psychology and Law Practice, should be a part of the core curriculum in every law school. The knowledge can serve the lawyer well at trial, with the client, in

80. S. GOLDBERG, E. GREEN & F SANDER, DISPUTE RESOLUTION 283, 293-98 (1985).

81. *See id.* at 271-78.

82. *See* T. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conf. of the U.S. Comm. on the Operations of the Jury System (Jan. 1984).

83. Many practitioners and scholars use these terms interchangeably, although there are significant distinctions among all four. *See* Murray, *Understanding Competing Theories of Negotiation,* 2 NEGOTIATION J. 179 (1986).

84. *Id.* at 180-81.

negotiation, and among the other members of the firm. Interpersonal skills are comparable to the operation of law as leverage in getting a client's dispute resolved fairly and efficiently. Lawyers currently rely on intuition rather than study and practice for their knowledge of interpersonal skills. Years of experience alone, however, cannot improve lawyer abilities. Lawyers will benefit only by combining experience with study and knowledge through law school classes and continuing legal education seminars.

IV CONCLUSION

Most legal disputes are settled. Lawyers file lawsuits in less than fifty percent of the total cases brought to them.[85] They settle the rest without any court assistance. Of those filed in court, lawyers resolve over ninety percent without trial. Even some cases tried to final judgment are settled by negotiation during appeal. Overall, lawyers and their clients rely on specific court judgments in less than one percent of the disputes.

Why then should lawyers concentrate on preparing most cases for trial? The answer is, they should not. The lawyer's goal should be to negotiate a favorable settlement for the client. A lawyer should consciously use court procedures and deadlines during negotiation in ways that will both increase the chances and acceptability of settlement and improve the probable court outcome. The goal, to optimize the client's return, can be attained from a negotiation process that is consistent with maintaining a good probable court outcome. To achieve this goal, the lawyer's attention must be focused on negotiation as the primary process for resolving the client's disputes.

85. *See* Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1980-81).